

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
August 15, 2007 Session

**CLINTON COBB v. STEWART TITLE GUARANTY CO.**

**Appeal from the Chancery Court for Hamilton County**  
**No. 05-1194     Howell N. Peoples, Chancellor**

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**No. E2006-02571-COA-R3-CV - FILED DECEMBER 20, 2007**

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In this breach of contract case, Clinton Cobb (“Insured”) alleges that the title insurance company with which he had contracted – Stewart Title Guaranty Company (“Insurance Company”) – has wrongfully failed to honor a claim filed by him, which claim arises out of restrictive covenants that he says make his property unmarketable. Insurance Company filed a motion to dismiss, arguing that the policy specifically and unambiguously excludes restrictive covenants from the ambit of its coverage. The trial court agreed and granted the motion. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court**  
**Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J. and SHARON G. LEE, J., joined.

Andrew L. Berke, Chattanooga, Tennessee, for the appellant, Clinton Cobb.

John C. Cavett, Jr., Chattanooga, Tennessee, for the appellee, Stewart Title Guaranty Company.

**OPINION**

The facts are not in dispute. The Insured purchased property containing two tracts of land. He also purchased title insurance from Insurance Company. The Insured intended to market the two tracts as separate properties, each of which was to be improved with an upscale residence. He took steps toward this goal. He subsequently discovered that restrictive covenants, in effect at the time of purchase but unknown to the Insured when he bought the land, forbid such a use of the land. He submitted a claim to Insurance Company, and when the company refused to pay, he sued. His complaint makes clear that his claim arises entirely and specifically out of problems caused by restrictive covenants.

Our standard of review of a trial court's decision on a motion to dismiss is as follows:

In considering a motion to dismiss, courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true, and deny the motion unless it appears that the plaintiff can prove no set of facts in support of [the] claim that would entitle [the plaintiff] to relief. In considering this appeal from the trial court's grant of the defendant's motion to dismiss, we take all allegations of fact in the plaintiff's complaint as true, and review the lower courts' legal conclusions *de novo* with no presumption of correctness.

***Stein v. Davidson Hotel Co.***, 945 S.W.2d 714, 716 (Tenn. 1997) (citations omitted).

The title insurance policy in question contains a front page, two pages of terms, and two one-page "schedules," Schedule A and Schedule B. The front page states, in pertinent part, as follows:

SUBJECT TO THE EXCLUSIONS FROM COVERAGE [contained at the bottom of the front page], THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS [on the two pages of terms], STEWART TITLE GUARANTY COMPANY, a Texas corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
4. Lack of a right of access to and from the land.

(Capitalization in original.) Schedule A contains a description of the property. Schedule B is the document at the heart of this case. It states, in pertinent part, as follows:

This policy does not insure against loss or damage (and the Company will not pay costs, attorney's fees or expenses) which arise by reason of:

8. Restrictive Covenants affecting the property described in Schedule A.

When this clause (“Exception 8”) is read in conjunction with the rest of the policy, it is clear that any loss or damage of the types listed on the front page, including encumbrances and unmarketability, will not be covered if they “arise by reason of . . . Restrictive Covenants affecting the property described in Schedule A.” The key question therefore is the meaning of the phrase “Restrictive Covenants affecting the property described in Schedule A.”

The construction of a contract is a matter of law. *Barnes v. Barnes*, 193 S.W.3d 495, 498 (Tenn. 2006). Likewise, “[t]he ascertainment of the intention of the parties to a written contract is a question of law or judicial function for the court to perform when the language is plain, simple and unambiguous.” *Forde v. Fisk University*, 661 S.W.2d 883, 886 (Tenn. Ct. App. 1983) (citing *Petty v. Sloan*, 277 S.W.2d 355, 358 (Tenn. 1955)).

“Insurance contracts are subject to the same rules of construction and enforcement as apply to contracts generally.” *McKimm v. Bell*, 790 S.W.2d 526, 527 (Tenn. 1990). Disputed contractual language must be examined in the context of the entire agreement. *Cocke County Bd. of Highway Comm’rs v. Newport Utils. Bd.*, 690 S.W.2d 231, 237 (Tenn. 1985). “Insurance policies should be construed as a whole in a reasonable and logical manner.” *Standard Fire Ins. Co. v. Chester O’Donley & Assocs., Inc.*, 972 S.W.2d 1, 7 (Tenn. Ct. App. 1998). Words must be given their usual and ordinary interpretation. *St. Paul Surplus Lines Ins. Co. v. Bishops Gate Ins. Co.*, 725 S.W.2d 948, 951 (Tenn. Ct. App. 1986).

In interpreting Exception 8, the Insured asks us to read the phrase “described in Schedule A” as modifying the entire phrase preceding it, *i.e.*, “Restrictive Covenants affecting the property,” rather than as merely modifying the word “property.” In other words, the Insured asserts that Exception 8 excludes only those restrictive covenants specifically described in Schedule A; all other restrictive covenants are, according to the Insured, covered by the policy.

This interpretation is contrary to the plain meaning of the language of Exception 8 and also contrary to a reasonable and logical construction of the contract as a whole. The natural and ordinary understanding of the phrase “Restrictive Covenants affecting the property described in Schedule A” is that “described in Schedule A” modifies only the word “property.” It is not the *covenants* that are described in Schedule A, but the *property*. Exception 8 is intended to exclude from the policy’s ambit all covenants affecting the property in question, *i.e.*, all covenants affecting the “property described in Schedule A.” It does not contemplate that the covenants themselves will be described in Schedule A.

A contrary reading of Exception 8 would render it effectively meaningless and superfluous. It is the nature of title insurance to provide the buyer with insurance against the subsequent discovery

of title defects previously unknown to him. If Exception 8 were read as applying only to covenants that are specifically described elsewhere in the policy documents, that exception would not exclude anything from the policy's ambit that is not already excluded by common sense. Obviously, the policy does not insure against defects that are already known to both parties and specifically delineated within the terms of the policy itself. That is implied by the very nature of the insurance policy. Moreover, this implication is arguably made explicit by the front page of the policy, which recites that the policy insures against the title or interest being "other than as stated" in Schedule A. It goes without saying that any title defect, encumbrance, unmarketability or other problem *explicitly contemplated by Schedule A* would not be covered by the policy, since the policy only protects the Insured against defects that diminish the value of what is described in Schedule A – and if a defect or encumbrance is itself described in Schedule A, then its existence can hardly diminish the value of that which is described in Schedule A.

The Insured is correct that "exceptions, exclusions and limitations in insurance policies must be construed against the insurance company and in favor of the insured." *Allstate Ins. Co. v. Watts*, 811 S.W.2d 883, 886 (Tenn. 1991). However, this rule of construction only comes into play when the language at issue is ambiguous. "A strained construction may not be placed on the language used to find ambiguity where none exists." *Farmers-Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975). The construction advanced by the Insured is strained in the extreme, and we will not adopt it. The meaning of the contractual term in question is plain and unambiguous. Any damage or loss caused by restrictive covenants is not covered by this policy.

Our ruling on this issue pretermits the other issues discussed in the parties' briefs. The Insured's claims are entirely grounded upon damage arising out of restrictive covenants; therefore he has no cause of action. Insurance Company's motion to dismiss was properly granted because the Insured can prove no set of facts that would entitle him to relief. We affirm. Costs on appeal are taxed to the appellant, Clinton Cobb. This case is remanded for collection of costs assessed in the trial court, pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE